IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORY MOYER,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JOSEPH CONTI, ET AL.,	:	
	:	
Defendants.	:	**NO. 99-CV-744**

M E M O R A N D U M

Schiller, J. **October 5, 2000**

On September 28, 2000, Plaintiff Cory Moyer filed notice of appeal to the Court's August 31, 2000, Order granting Defendants W. Russell Faber and the Pennsylvania Senate's Motion for Summary Judgment. (Document No. 23). I write pursuant to Third Circuit Local Appellate Rule 3.1 to explain my ruling.[1]

I. BACKGROUND

Plaintiff Cory Moyer ("Mr. Moyer"), a quadriplegic confined to a wheelchair, alleges that on January 4, 1999, he attempted to enter the offices of Pennsylvania Senator Joseph Conti ("Senator Conti") located at 10 East Court Street in Doylestown, Pennsylvania. (Compl. at ¶¶ 3, 10; Moyer affidavit[2] at ¶ 2). Mr. Moyer intended to discuss "disability issues" with Senator Conti and his staff because he was concerned about "the lack of accessibility throughout the

[1]Pursuant to Third Circuit Local Appellate Rule 3.1, the Court is authorized to file and mail to the parties a written opinion or a written amplification of a prior opinion within 15 days of the filing of a notice of appeal.

[2] Mr. Moyer's affidavit is unsigned. In his letter to the Court dated January 24, 2000, counsel for Plaintiff explained that Mr. Moyer's "fax machine broke while transmitting the certification." I note, however, that the nature of Mr. Moyer's injury is not in dispute.

Doylestown area." (Compl. at ¶ 10; Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 1). Mr. Moyer asserts that he was prevented from gaining entry into Senator Conti's office because he was unable to climb the steps leading to the door. (Compl. at ¶ 11). In addition, Mr. Moyer contends that Senator Conti's office was inaccessible because it lacks "disabled parking." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 1). Thus, Mr. Moyer claims that he was "excluded from the services of defendant's [sic] based on his disability" in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. ("ADA") (Compl. at ¶¶ 6-9, 12). Mr. Moyer alleges that he "still desires to use the services of the defendants." (Compl. at ¶ 14).

Mr. Moyer originally filed suit against Senator Conti and the Pennsylvania State Senate ("Senate") on February 12, 1999, in the Eastern District of Pennsylvania, seeking damages for emotional distress, equitable relief, costs and attorney's fees. (Compl. at ¶ 13, 4). On July 27, 1999, the Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, granted defendants' uncontested motion to dismiss with prejudice as to claims against Senator Conti with prejudice and all claims for damages. See Moyer v. Conti, No. 99-744 (E.D. Pa. July 17, 1999) (order granting uncontested motion to dismiss) (Document No. 4).

The Court then granted Mr. Moyer's motion for leave to file an amended complaint. See Moyer v. Conti, No. 99-744 (E.D. Pa. Sept. 15, 1999) (order granting Plaintiff's motion for leave to file an amended complaint). Mr. Moyer amended his complaint to bring suit against W. Russell Faber ("Mr. Faber"), in his capacity as chief clerk of the Pennsylvania Senate. In addition to the Senate (collectively "Defendants") and to relinquish his claim for damages. (Amended Compl. at 1). Mr. Moyer asks the Court to order Mr. Faber to ensure that the Senate complies with the ADA, alleging that Mr. Faber, as the Chief Clerk of the Senate, "is the

individual who has the authority to ensure defendant Pennsylvania State Senate obeys the mandates of the ADA." (Amended Compl. at ¶¶ 17, 18).

Defendants then filed a notice of constitutional challenge pursuant to Federal Rule of Civil Procedure 24(c) challenging the constitutional propriety of Congressional abrogation of the immunity from suit provided to the states by the Eleventh Amendment to the United States Constitution. (Document No. 10). Subsequently, Judge Robreno ordered that a copy of Defendants' notice of constitutional challenge be served on the Attorney General of the United States and the United States Attorney for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 2403 and Federal Rule of Civil Procedure 24(c). See Moyer v. Conti, No. 99-744 (E.D. Pa. Dec. 17, 1999) (order requiring service of notice of constitutional challenge on U.S. Attorney General and U.S. Attorney for Eastern District of Pennsylvania) (Document No. 12).

Also on December 13, 1999, Defendants filed a motion for summary judgment, asserting several arguments that can be categorized as follows: (1) Plaintiff lacks standing; (2) There exists no genuine issue of material fact and Defendants are entitled to judgment as a matter of law; (3) Plaintiff is not entitled to relief under the ADA; (4) Plaintiff's claims are barred by the Eleventh Amendment. (Document No. 9).

On February 22, 2000, the United States Department of Justice, Civil Rights Division, requested that the Court wait to decide Defendants' motion for summary judgment pending the United States Supreme Court's decision in Florida Dept. of Corrections v. Dickson, No. 98-829, and Alsbrook v. Arkansas, No. 98-829, which the Department of Justice claimed would likely control the disposition of the motion then before the Court. (Document No. 17). The next day, the Supreme Court dismissed the writ of certiorari in Dickson pursuant to Rule 46.1 of the Rules

of the Supreme Court of the United States.[3] See Florida Dept. of Corrections v. Dickson, ___ U.S. ___, 120 S. Ct. 1236 (2000). The Supreme Court similarly dismissed the writ of certiorari in Alsbrook one week later. See Alsbrook v. Arkansas, ___ U.S. ___, 120 S. Ct. 1265 (2000).

In July, this case was reassigned to my calendar through the Court's random reassignment procedures. See Moyer v. Conti, No. 99-744 (E.D. Pa. July 13, 2000) (reassignment order) (Document 18). On August 16, 2000, I granted Defendants' motion for leave to file a supplemental brief and also granted plaintiff leave to file a supplemental brief.[4] See Moyer v. Conti, No. 99-744 (E.D. Pa. Aug. 16, 2000) (order granting motion for leave to final supplemental brief) (Document No. 20). On August 31, 2000, I granted Defendants' motion for summary judgment dismissing Plaintiff's case.[5] See Moyer v. Conti, No. 99-744 (E.D. Pa. Aug. 31, 2000) (order granting summary judgment) (Document 22). Plaintiff then filed notice of appeal. (Document 23).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is properly granted when there exists no genuine question of material fact for resolution at trial and the moving party is entitled to judgment as a matter of law. See

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[3]Pursuant to Rule 46.1, "[a]t any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal."

[4]Defendants' supplemental brief was filed on August 16, 2000. No supplemental brief was filed by Plaintiff, although Plaintiff did file a brief in opposition to Defendants' motion for summary Judgment (Document 15) and a response to Defendants' statement of uncontested facts (Document 14) on January 24, 2000.

[5]Although the Court's August 16, 2000, and August 31, 2000, Orders were sent by mail to counsel for the Plaintiff at his address of record, both were returned marked that the time for forwarding by the post office had expired. The office of Plaintiff's counsel was contacted to obtain an address for Plaintiff's counsel despite his failure to notify the Clerk's Office or the Court of his change of address. Copies of both Orders were then sent by mail to Plaintiff's counsel at his new address on September 7, 2000. In addition, a copy of the Court's August 31, 2000, Order was sent to Plaintiff's counsel via facsimile on September 13, 2000.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1362 (3d Cir. 1992); FED. R. CIV. P. 56(c). The substantive law determines which facts are material. See Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbuster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). In evaluating the existence of a genuine issue of material fact, inferences must be drawn in the light most favorable to the nonmoving party. See Matsushita Electric Indus., Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Summary Judgment is particularly appropriate where the unresolved issues are primarily legal rather than factual. See Alsbrook v. City of Maumelle, 184 F.3d 999, 1004 (8th Cir. 1999) (citing Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990), cert. dismissed sub nom. Alsbrook v. Arkansas, 120 S.Ct. 1265 (2000)).

III. ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

As interpreted through a series of United States Supreme Court decisions over the course of more than 100 years, the Eleventh Amendment embodies a general prohibition against suits brought against the States. See, e.g., Kimel v. Florida Bd. of Regents, ___ U.S. ___, 120 S. Ct. 631, 650 (2000); City of Boerne v. Flores, 521 U.S. 507, 519 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); Ex parte Young, 209 U.S. 123

(1908); Hans v. Louisiana, 134 U.S. 1 (1890).

In Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793), a case decided before the ratification of the Eleventh Amendment, the Supreme Court ruled that the state of Georgia could be sued by a citizen of South Carolina. Following the ratification of the Eleventh Amendment, the Supreme Court adopted a broad reading of the text, barring an individual from commencing suit against his state of citizenship as well as against another state. See Hans, 134 U.S. at 21.

Plaintiff, in his brief in opposition to Defendants' motion for summary judgment, does not offer any argument or cite any authority for the proposition that suit against a state senate is not a suit against the state itself for Eleventh Amendment purposes. (Document No. 15). To the extent that Mr. Moyer contends that the Senate is not the state, I will address that claim. The Third Circuit has articulated a three-prong test for determining whether an entity is an alter ego of the state for purposes of the Eleventh Amendment. See Peters v. Delaware River Port Auth., 16 F.3d 1346, 1350 (3d Cir. 1994). The most important factor, according to the court in Peters, is whether payment of any judgment to plaintiff would be paid by the State. Id. Second, the court must consider the status of the agency under state law. Id. Third, the court must assess the degree of autonomy the entity has from the state. Id. As Article 2, section 1 of the Pennsylvania Constitution[6] makes clear, the Senate is an arm of the Commonwealth. In applying the Peters test, the court in Larsen v. Senate of the Commonwealth of Pennsylvania, 955 F. Supp. 1549, 1560-1 (M.D. Pa. 1997), aff'd in part, rev'd in part, 152 F.3d 240 (3d Cir. 1998), determined that a suit against the Senate is a suit against the Commonwealth. I am compelled to conclude that the Pennsylvania Senate is an arm of the Commonwealth and is an alter ego of the state for

[6]Article 2, section 1 of the Pennsylvania Constitution provides: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

Eleventh Amendment purposes. Compare Williams v. Pennsylvania State Police-Bureau of Liquor Control Enforcement, 108 F. Supp.2d 460, 465 (E.D. Pa. 2000) (finding that Pennsylvania State Police-Bureau Control Enforcement, as part of the Pennsylvania State Police and an agency of the Commonwealth, is an alter ego of the State for purposes of the Eleventh Amendment).

I must now consider whether there is any exception to the Eleventh Amendment's general prohibition on the ability of private individuals to sue the States that permits suit by Mr. Moyer against the Senate and whether Mr. Faber can be properly sued by Mr. Moyer under the circumstances of this case. I note that by letter dated January 24, 2000, Plaintiff's counsel stated that after reviewing the Supreme Court's decision in Kimel, ___ U.S. at ___, 120 S. Ct. at 650, in which the Court concluded that the Eleventh Amendment bars suit against the States under the Age Discrimination in Employment Act of 1967, Plaintiff "decided not to contest the aspect concerning the 11th Amendment issues. Consequently, the plaintiff still maintains that the Ex parte Young exception to Defendant Faber is still applicable." Because it is unclear whether Mr. Moyer intended to pursue his action against both the Senate and Mr. Faber, I will consider whether his suit survives as to either.

Since Hans, there have been scores of cases identifying which kinds of suits are prohibited by the Eleventh Amendment. It is well settled that if a state "waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." Atascadero State Hosp., 473 U.S. at 238; accord Hans, 134 U.S. at 17 (noting "[u]ndoubtedly a state may be sued by its own consent"). There is no suggestion by Mr. Moyer that the Commonwealth has agreed to be sued through the Senate under the ADA.

A second path to passing through the Eleventh Amendment roadblock is via valid

congressional abrogation of immunity. In Fitzpatrick, 427 U.S. at 456, the Supreme Court announced that Congress can make the States amenable to suit in federal court pursuant to its powers under section 5 of the Fourteenth Amendment. The Supreme Court has articulated "a simple but stringent test" to employ in determining whether Congress has effectively abrogated the States' protections under the Eleventh Amendment. Dellmuth v. Muth, 491 U.S. 223, 228 (1989). The test requires the court to evaluate first whether "Congress has 'unequivocally expresse[d] its intent to abrogate the immunity" and, if so, then consider whether in abrogating state immunity, Congress acted "'pursuant to a valid exercise of power.'" Seminole Tribe of Florida, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

Recently, in Kimel, ___ U.S. at ___, 120 S. Ct. at 650, the Supreme Court held that Congress failed to effectively abrogate the States' sovereign immunity to suit by private individuals in enacting the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. Shortly after the Supreme Court's decision in Kimel, the Third Circuit addressed the question of whether Congress validly abrogated sovereign immunity with respect to Title I of the ADA.[7] See Lavia v. Comm. of Pennsylvania, No.99-3863, 2000 WL 1121553, at *3 (3d Cir. Aug. 8, 2000). The court in Lavia concluded that Congress clearly satisfied the first prong of the test by stating expressly its intent to nullify the Eleventh Amendment's bar to suit against the States.[8] Id. In addressing the second prong, the Third Circuit observed that while Congress does

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[7]Title I of the ADA "protects qualified disabled individuals 'who, with or without reasonable accommodation, can perform the essential functions of the employment position' from discrimination in 'the hiring, advancement, or discharge of employees, employment compensation, job training and other terms, conditions, and privileges of employment'" by public and private employers, employment agencies and labor unions, excepting the federal government and small businesses. Lavia, No.99-3863, 2000 WL 1121553, at *4 (quoting 42 U.S.C. §§ 12111(8), 12112(a)) (internal citations omitted).

[8]Section 12202 of the ADA provides: "A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in federal or State court of

have the authority to enact legislation pursuant to its Article I powers, that authority does not allow it to abrogate the States' immunity under the Eleventh Amendment. Id.

Since the Supreme Court's announcement in Fitzpatrick, however, Congress' authority to abrogate the Eleventh Amendment under its section 5 power to enforce the Fourteenth Amendment has been settled. Id.; accord Kimel, __ U.S. at ___, 120 S. Ct. at 644. In order to constitute valid exercise of Congress' section 5 power, Congress must "identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Id. (quoting Florida Prepaid Postsecondary Educ. Expense Bd. v. Collge Sav. Bank, 527 U.S. 627, 639 (1998)). Because Congress's authority under section 5 extends only to enforcing the provisions of the Fourteenth Amendment, it must be limited in scope to remedial enforcement of that amendment. Id. at *3, 4 (quoting City of Boerne, 521 U.S. at 519). The court in Lavia concluded that Congress did not abrogate the States' Eleventh Amendment immunity pursuant to a valid exercise of its section 5 enforcement authority, ruling that "[w]ithout more detailed findings concerning a nationwide pattern of arbitrary and illegitimate discrimination against the disabled by the states, the ADA cannot be viewed as a proportional and congruous response to the problem of state-perpetrated discrimination against the disabled." Id. at *10, *11.

Mr. Moyer brings the instant action under Title II of the ADA. Title II protects qualified disabled individuals from exclusion from participation in or denial of the benefits of the services, programs, or activities of a public entity or from discrimination by any such entity. See 42 U.S.C. § 12132. The court in Lavia expressly left open the question of whether Congress validly abrogated the States' Eleventh Amendment immunity under Title II of the ADA. See Lavia,

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competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

No.99-3863, 2000 WL 1121553, at *11 n.2.

While the Third Circuit has not spoken as to whether a state may be sued under Title II of the ADA, the Eighth Circuit has ruled that the "extension of Title II of the ADA to the states constitutes a proper exercise of Congress's power under Section 5 [of the Fourteenth Amendment]." Alsbrook v. City of Maumelle, 184 F.3d 999, 1007 (8th Cir. 1999). While Courts of Appeals in other Circuits, have concluded to the contrary, I note that those rulings were made prior to the Supreme Court's pronouncement in Kimel. See, e.g., Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir.), cert. denied, 525 U.S. 819 (1998) (holding Title II of the ADA is enforceable against the states); Clark v. California, 123 F.3d 1267, 1269 (9th Cir. 1997) (finding that Congress validly exercised its power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment through Title II of the ADA), cert. denied sub nom. Wilson v. Armstrong, 524 U.S. 937 (1998); Crawford v. Indiana Dep't. of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (ruling that Congress acted within its powers in enacting Title II of the ADA resulting in its enforceability against the States), overruled by Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois Univ., 207 F.3d 945, 948 (7th Cir. 2000); Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that Congressional abrogation of the Eleventh Amendment through the ADA was valid), rev'd on other grounds, ___ U.S. ___, 120 S. Ct. 631 (2000).

Although the Seventh Circuit concluded that Congress had successfully removed the Eleventh Amendment barrier to suit by private citizens under Title II of the ADA in 1997, see Crawford, 115 F.3d at 487, it abrogated its initial ruling in the aftermath of Kimel, see Erickson, 207 F.3d at 948. While the action before the court in Erickson was brought under Title I of the ADA, the Seventh Circuit expressly recognized that its decision in Crawford "is no longer

authoritative."[9] Erickson, 207 F.3d at 948;

I agree with the court in Alsbrook that "the state of the legislative record, alone, cannot suffice to bring Title II within the ambit of Congress's Section 5 powers if Title II is not 'adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against.'" Alsbrook, 184 F.3d at 1008 (quoting City of Boerne, 521 U.S. at 532). I conclude that the Supreme Court's reasoning in Kimel as well as the Third Circuit's reasoning in Lavia applies equally to Title II of the ADA and find that Congress did not validly pierce the shield of immunity provided to the States through the Eleventh Amendment.

I now consider the third manner in which the Eleventh Amendment obstacle to suit can be overcome with respect to Mr. Moyer's claim against Mr. Faber. As the Supreme Court reestablished in Seminole Tribe, since the Court's decision in Ex parte Young, 209 U.S. 123 (1908), the Court "has often found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 517 U.S. at 73(quoting Green, 474 U.S. at 68). The presumption underlying the Ex parte Young fiction is that because the States are not empowered to authorize their officials to violate federal law, a state official who violates federal law cannot be an alter ego of the state and thus the Eleventh Amendment presents no jurisdictional barrier to suit. See Ex parte Young, 209 U.S. at 159-60. Consequently, in order to be a proper defendant, the state official must have violated federal law. Here, Mr. Moyer claims that Mr. Faber failed to ensure that the Senate complied with the Title II of the ADA. (Amended Compl. at ¶ 17). Because, as

[9]In addressing the issue of whether the State can be properly sued under the ADA, some courts have not distinguished between Title I and Title II. See, e.g., Martin v. Kansas, 190 F.3d 1120, 1127 (10th Cir. 1999) (determining that the States are not subject to suit under the ADA in its entirety in case appearing to be based only on Title I of the ADA); Muller v. Costello, 187 F.3d 298, 309-10 (2d Cir. 1999) (same); Williams, 108 F. Supp.2d at 465 (same).

discussed above, Title II of the ADA is not enforceable against the state through the Senate, Mr. Faber could not have violated any federal law if in fact he failed to require ADA compliance.[10]

IV. CONCLUSION

For the above-stated reasons, I conclude that Congress failed to validly abrogate the States' immunity to suit by private individuals provided by the Eleventh Amendment through Title II of the ADA. Thus, Title II of the ADA is not enforceable against the Commonwealth through the Senate. Furthermore, because Title II is not enforceable against the Commonwealth, suit against Mr. Faber under the Ex parte Young doctrine cannot survive and therefore, I granted summary judgment in favor of Defendants.

Berle M. Schiller, J.

[10] According to Federal Rule of Civil Procedure 56(e), in order to survive a motion for summary judgment the nonmoving party must offer "specific facts showing there is a genuine issue for trial." See Matsushita Electric Indus. Co., 475 U.S. at 585. It is insufficient for an opposing party to rest on his pleadings as "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56 advisory committee's note to subsection (e), 1963 Amendment. I note that Mr. Moyer directed me to no evidence that Mr. Faber, as chief clerk of the Senate, was charged with the responsibility of ensuring compliance with the ADA, beyond vague and bald assertions in his amended complaint. As a result, even if the Senate was subject to Title II of the ADA, there are no facts to suggest that Mr. Faber violated federal law and thus Mr. Moyer's claim against Mr. Faber could not have survived summary judgment.